IN THE HIGH COURT OF UTTARANCHAL, NAINITAL,

No. 10- COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32(2) (b)]

Criminal Misc. Application No. 884/2005

Raj Kumar Jain Applicant

Vs.

State of Uttaranchal Respondent.

AND

Criminal Misc. Application No. 890/2005

Raj Kumar Jain Applicant

Vs.

State of Uttaranchal Respondent.

Decided on 22-08-2006

A.F.R. (Approved for Reporting)
Not Approved for Reporting

(B.C. Kandpal, J.)

Dated: 22nd August, 2006.

In the High Court of Uttaranchal, at Nainital
Criminal Misc. Application No. 884/2005

Raj Kumar Jain S/o late Asha Ram Jain
R/o Neshvilla Road, Dehradun,
District Dehradun ..... Applicant

Vs.

State of Uttaranchal ..... Respondent.

AND

Criminal Misc. Application No. 890/2005

Raj Kumar Jain S/o late Asha Ram Jain
R/o Neshvilla Road, Dehradun,
District Dehradun ..... Applicant

Vs.

State of Uttaranchal ..... Respondent.

Sri S.K. Aggarwal, learned Senior Advocate, assisted by Sri G.K. Verma, learned counsel for theapplicant.
Sri A. Rab, learned Addl. G.A. for the respondent.

Hon'ble B.C. Kandpal, J.

The present petitions have been filed by the petitioner, who is facing the trial U/Ss 409, 120-B I.P.C. read with Section 13 (1) (c) (d) (ii) and Section 13 (2) of the Prevention of Corruption Act, 1988, before the Court of Additional Sessions Judge/ II Fast Track Court, Nainital.

2- As both the petitions have been filed challenging the charge sheet No. 03/2002 and charge sheet No. 02/2002, and the facts involved in both the petitions

are materially similar, therefore, both the petitions are being disposed of by this common judgment.

3- Brief facts of the case that the petitioner was posted as an Executive Engineer in Mechanical Equipments and Store, Khand- 1, Dehradun, a unit of Irrigation Department. The duty of the said Division was to supply raw material, viz. cement and steel etc to all the segments of the department, who were handling different projects in connection with Yamuna Valley Project at different places. The petitioner was to procure raw material from different firms, manufactures or their consignee agents or C & F agents to meet the above requirement. The petitioner used to procure cement from two sources- (a) M/S Maihar Cement Limited, Satna, a concern of Birla Group and (b) U.P. Rajkiya Cement Nigam.

4- The allegations made in the first information report are that the petitioner R.K. Jain was posted in Mechanical Equipment Store Khand- 1 as Executive Engineer from 1.1.94 to 28-5-1998 and he made payment to Maihar Cement, Santa fro supply of cement through its consignee agent M/s Sri Trader (India) Chhabra Complex, Saharanpur from time to time. On 23-5-1998 while going on transfer Sri R.K. Jain, the applicant made payment of Rs. 67,74000/- as advance payment through four bank drafts to M/s Maihar Cement. He has supplied to the department 3600 bags of cement after 23-5-1998, i.e. after this advance payment was received. Request was made to M/s Maihar Cement to stop the supply of the cement during the rainy season. Return of the entire payment made in advance was also demanded from it by Sri B.B.L. Mittal

on the ground that whenever there will be a requirement of cement, fresh demand and payment for that shall be made by the department.

5- It is further alleged in the first information report that on 26-10-1998 M/s Maihar Cement vide its letter informed the department that Sri Pal, owner of M/s Sri Trader (India), its consignee had committed fraud as he got printed letter pad of the company, without taking the company into confidence, in collusion with the Officers of the department used said pad in submitting quotation and the proforma bills and in receiving the advance payments. M/s Maihar Cement denied knowledge of any order from the department or of any transaction. The Maihar Cement advised the department to prosecute him U/Ss 420, 467, 471 I.P.C. It is further alleged therein that from 1.11.1998 the agency of the said consignee agent has been cancelled by the company. It also declined to own any responsibility for the payment made to Sri Pal by the department to make any supply of cement against such payment.

6- On the basis of the aforesaid letter Sri B.B.L. Mittal lodged the first information report against Sri Pal and the applicant U/Ss 13(1))(c) (d) (ii) and 13 (2) of Prevention of Corruption Act and U/Ss 420, 468, 471 I.P.C. which is the subject matter of charge sheet no. 03/2002.

7- Sri B.B. Mittal lodged another first information report in the capacity of the successor Executive Engineer to the Khand- I, pertaining to the fact that the applicant issued 5-6 drafts through the consignee and

forwarding agent Sri Nath Enterprises to U.P. Rajkiya Cement Nigam, Dehradun.

8- The police investigated the matter and submitted two charge sheets against the petitioner, charge sheet No. 3/2002 and charge sheet No. 2/2002 respectively in the above said two F.I.R.

9- The offence in the charge sheet No. 3/2002 centers round the payment of Rs. 67,74,412/- paid to the M/s Maihar Cement by different bank drafts through its consignee agent, M/s Sri Traders (India) Chhabra Complex, Ambala Road, Saharanpur, while the charge sheet No. 2/2002 centers round the payment of Rs. 25,92,000/- paid to U.P. Rajkiya Cement Corporation through its consignee/ forwarding agent, Sri Nath Enterprises.

10- The Consignee/forwarding agent of U.P. Rajkiya Cement Nigam (hereinafter called as "U.P.R.C.N." was M/s Sri Nath Enterprises, Chhabra Complex, Ambala road, Saharanpur and the consignee/forwarding agent for Maihar Cement Santa was Sri Trader (India), Chhabra Complex, Saharanpur. These two firms were partnership firms having Sri Sri Pal and Sri Sunil as their partners. The owners of the two firms are thus common.

11- The petitioner has thus by way of the aforesaid two petitions challenged the charge sheets filed against him before the court concerned as well as the entire proceedings of the Special Trial No. 2/2003, State Versus R.K. Jain, pending in the court of Special Judge/II F.T.C., Nainital U/Ss 409, 120-B I.P.C. and Section 13 (c) (d) (ii) read with Section 13 (2) of

Prevention of Corruption Act, 1988 as well as the proceedings of Special Trial No. 3/2002, State Versus R.K. Jain, pending in the court of Special Judge/ II F.T.C., Nainital U/Ss 409, 120-B I.P.C. and Section 13 (c) (d) (ii) read with Section 13 (2) of Prevention of Corruption Act, 1988.

12- Heard the learned counsel for the parties and perused the record.

13- The record of the two cases before me show that the petitioner used to procure cement from two sources – (a) M/S Maihar Cement Limited Satna, a concern of Birla Group and (b) U.P. Rajkiya Cement Nigam. As per the learned counsel for the petitioner, the job of the petitioner was to maintain sufficient stock in advance to meet the demands, coming from any segments and the payment for such demand was to come from the segments raising such demand to the Mechanical Equipments and Store Khand- I. The procedure and practice was that the concerned Divisions engaged in executing different projects under Yamuna Valley Project, will make their demand to the petitioner's Khand- I by way of indents and such indents were to accompany with bank drafts or demand drafts. These drafts are to be drawn in favour of the company itself. The petitioner used to hand over those drafts to the authorized consignee or forwarding agents of the aforesaid two cement companies. These companies in due course of time used to supply the cement to the value of the money received from the petitioner, i.e. the Mechanical Equipment and Store Khand-I. The petitioner in turn used to meet the demand of the concerned Divisions by supplying the

cement received from any of the two cement companies.

14- The record further shows that the demand drafts were drawn by the Store Division itself in the name of concerned manufactures, i.e. any of the two cement companies whose cement it desires to have. The petitioner in paragraphs 6 and 7 of the petition has also averred that at times the demands are also made by the Divisions through the Chief Engineer and in such a situation the funds are released by the Chief Engineer directly to the Mechanical Equipments and Store Khand- I for providing their requirements.

15- Annexure 2-A and 2-B annexed along with the petition No. 884/2005 reveal that the consignee agents used to issue receipt for such payment on behalf of their company. Further Annexure No. 3 is the authorization for receiving the order issued by Mechanical Equipments and Store Khand in favour of Maihar Cement. Therefore, from the aforesaid facts it becomes evident that the petitioner was acting only as a go in between and there is hardly anything to gain personally by him to himself from these transactions. No such evidence could be pointed out before me by the respondent which has been collected during the investigation corroborating this fact that the petitioner had gained anything personally for himself from the transactions.

16- The statement of Sri Ram Prasad Semwal as well as Sri V.P. Tyagi, contained as Annexures 9 and 10 respectively to the petition, reveals that these two witnesses belong to the department and from their evidence the procedure adopted by the petitioner finds

full corroboration. In the statement of Sri Semwal given before the I.O., two important facts have come to the fore- (a) that the drafts were handed over by him to Sri Pal, the consignee agent of Maihar Cement. This witness feigns ignorance regarding handing over of the fourth draft bearing No. 960265 for Rs. 1,90,412/-. This witness admits that the supply of cement against the order dated 19-5-1998 No. C-118, was started by sri Pal at Dhalipur Store from 27-5-1998 and till 2-6-1998 supply of 2227 bags of cement was made by him. Thereafter, the supply was stopped by Sri Pal on the order of Sri B.B.L. Mittal, Executive Engineer. He has also stated that no supply of cement thereafter was received either from Maihar Cement Company or from U.P. Rajkiya Cement Nigam or its consignee agents. This witness has also stated before the I.O. that Sri Pal was working as consignee agent for the last several years and drafts prepared in the name of the company were always given to him. He has also admitted that Sri Pal had been making regular supply of the cement from March 1997 to May 1998 in a proper manner and well within time allotted to him.

17- The aforesaid facts assumes considerable importance in the context of the facts of this case and there was absolutely no occasion for the petitioner to entertain any doubt in Sripal Traders. It is admitted by Sri Semwal that against the supply order, payment for which was handed over by him to Sripal, supply of cement was started within five days of its receipt despite the time for supply being six months. This witness has further stated that after 23-5-1998 till 27-5-2000, 184000 bags of cement were purchased by Sri Mittal against different supply order during rainy season itself.

18- On one hand further supply of cement was stopped by Sri Mittal, on the pretext of rainy season, but on the other hand it reveals that Sri Mittal on 27-8-1998 purchased 10000 bags of cement from U.P. Rajkiya Cement Corporation, Dehradun. A specific question was asked by the I.O. to Sri Semwal- as to whether on 23-5-1998 cement was required, then his response was that at the aforesaid time number of projects were in execution, hence the question of no requirement of cement does not arise. He has also responded that even after 23-5-1998 Sri Mittal purchased sufficient quantity of cement from other sources as well.

19- It is, thus clear, from the aforesaid evidence that the sufferance of any loss of money by the department was the handi work of Sri Mittal, the then Executive Engineer of Khand- I, and not on account of any misconduct on the part of the petitioner and the petitioner cannot be held responsible for any misconduct in the discharge of his official duty which is an important ingredient of Section 13(1)(c) of the Prevention of Corruption Act. In fact there remains no evidence to establish this fact.

20- In this context the note put by the Investigating Officer at the foot of statement of Sri Semwal, assumes serious significance, which is to this effect – "एक तरफ तो उनके व्दारा वर्षा काल में कहकर सीमेण्ट आपूर्ति रोक दी गयी, फिर वर्षाकाल में ही 10 हजार बैग खरीदे गये हैं क्या उनके व्दारा कन्साइनमेंट ऐजेन्ट से उक्त आपूर्ति हेतु कहा गया था या कॅपनी को आपूर्ति हेतु कहा गया था। केवल पूर्व अधि0 अभि0 श्री आर0 के0 जैन

व्दारा दिये गये आपूर्ति आदेश को रोकवा कर विभाग का पैसा फॅसा दिया गया तथा स्वयं के आपूर्ति आदेशों पर सीमेंण्ट क्रय किया गया है । ''

21- Further the statement of V.P. Tyagi, which is contained in Annexure No.10, is also of equal importance. It reveals from his statement that the department, i.e. Mechanical Equipments and Store Khand-I was accepting supply of cement during his tenure from U.P. Rajkiya Cement Nigam and Maihar Cement and in very few cases the purchase of cement from other companies was made during this period. He has further stated before the I.O. that the department received cement from these companies through their consignee agents Sri Traders and Sri Nath Enterprises. The statement of this witness also reveals that on 23-5-1998 the petitioner got two drafts prepared in the name of Maihar Cement Company for the amount of Rs. 24,80,000/- and Rs. 37,20,000/-. These drafts were handed over to Sri Pal along with supply order and receipt of these drafts was also obtained from him. He has further stated that these drafts were handed over by Sri Semwal as per the prevailing practice in the department. He has further stated that Sri Pal handed over those drafts to Sri L.M. Singhvi, Marketing Manager of Maihar Cement, then and there. He has further corroborated the supply of cement by Sri Traders against the aforesaid supply order from 28-5 1998 thought he qualified by saying that the supply was made by Sri Traders without giving any information to his subordinate Junior Engineers. The statement of this witness again makes the picture very clear that it is undisputed that the petitioner had not misconducted himself in any manner in passing on the drafts to the consignee agent for further supply of the cement. On

the contrary he acted in accordance with the practice in prevalence in the department from before for advance supply of cement. This fact stands amply established from the statements U/S 161 Cr.P.C. of these two witnesses.

22- The statement of Sri B.B.L. Mittal has been annexed as Annexure – 6 to the petition and it is revealed from this document that in lodging the F.I.R. Sri Mittal acted on the information received from M/s Maihar Cement Company to the effect that drafts handed over to Sri Pal Traders at the behest of the petitioner as advance payment were not delivered by Sri Pal Traders to the Maihar Cement Company. The consignee agent had obtained cement against those drafts and misappropriated the amount by its sale in the market. The statement further reveals that from the enquiry made from the aforesaid company, it appears that Sri Pal had used the money received from Mechanical Equipments and Store Khand – I in clearing ihis own arrears and sold out the cement in the open market and misappropriated the money by converting it in his personal use. Sri Mittal further stated to the I.O. that Sri Pal promised for supplying the cement to the department against the money received by him, but failed to keep his promise. I do not find any evidence to prove this fact. In reply to the question, that he purchased during his tenure large quantity of cement and before doing so, did he enter in correspondence with Sri Pal? ,Sri Mittal did not answer this question in positive terms. Sri Mittal in the end of his statement admitted a very important fact that the payment of all the drafts was credited in the account of Maihar Cement and in case if the company had any dues against its consignee agent for supply of cement

to him, it ought to have been recovered from the said consignee agent. This admission of his has a far reaching effect upon the case against the applicant.

23- In the counter affidavit the respondents have not denied the contents of the statements made by the aforesaid witnesses before the Investigating Officer. Thus this court can act upon their statements at this stage as well.

24- It is, therefore, quite clear from the aforesaid part of the statement of Sri Mittal made before the I.O., that there was no intention to involve the petitioner in the instant case. The report in fact was lodged against Sri Pal and Sri Sunil, the owners of Sri Traders and Sri Nath Enterprises as consignee agents of M/S Maihar Cement and 'U.P.R.C.N.' As a matter of fact the offence of misappropriation is established against these two persons only. So far as the applicant is concerned, he can not, therefore, be held responsible for it.

25- So far as the petitioner is concerned, use of Section 120-B I.P.C. by the I.O. to lay a charge U/S 13 (1) (c) (d) (i) (ii) and Section 13 (2) of Prevention of Corruption Act is not only a gross abuse of authority and law but is also motivated. Unless there exists sufficient evidence to prove any misconduct on the part of the petitioner in the discharge of his official duties, as well as any unlawful gain for himself from these transactions in that process, none of these offences can be established against him. It is evident from the record that the petitioner was acting as a courier in between. He has to hardly gain for himself from such transactions. There is neither any such allegation nor evidence in corroboration of it. It is also clearly

apparent from the practice and procedure in prevalence in the department which has earlier been discussed in detail.

26- Another most important fact which is revealed from the record that Chief Engineer held a meeting, in which Sri Pal on behalf of Sri Pal Traders and Sri Nath Enterprises, Sri B.B.L. Mittal, the successor Executing Engineer participated. In this meeting Sri Pal has acknowledged the payments and agreed to supply the cement of equal value to the money he has received in the presence of Chief Engineer, but no supply of cement was made. Thus caused the loss to the department, as the money to the tune of Rs. 25, 92,000/- and Rs. 67,74000/- was blocked with Sri Nath Enterprises as well as Sri Pal Traders, who were forwarding agents of U.P. Rajkiya Cement Nigam as well as Maihar Cement Company.

27- The Hon'ble Supreme Court in a case reported in **R. Balakrishna Pillai Vs. State of Kerala** reported in **A.I.R. 2004 Supreme Court 1012** has held that the ingredients of the offence U/S 5 (1) (d) read with Section 5(2) of the Prevention of Corruption Act are – (a) abuse of position as public servant; (b) obtaining for himself or for another, any valuable thing or pecuniary advantage; (c) by corrupt or illegal means. And there should be evidence that a person has obtained any valuable thing or pecuniary advantage for any other person can well be said to be causing "to obtain" to any particular person any benefit or advantage. The Hon'ble Apex Court has considered the meaning of word "obtain" as "whether there was an acceptance of what is given as a bribe and whether there was an effort on the part of the receiver to obtain the pecuniary

advantage by way of acceptance of the bribe." Thus, looking to the definition of the crime in the case in hand viz. clause (d) of sub Section (1) of Section 5 of the Act, according to the principle indicated by the Hon'ble Apex Court, it is necessary that the act must have been done illegally abusing the position as public servant for obtaining benefit, pecuniary or otherwise for himself or some one else.

28- In the instant cases on the basis of the strength of the evidence available on the record the element of *means rea* or intention is completely lacking in these cases and the petitioner did not make any gain in any manner from these transactions. As a matter of fact the prosecution has failed miserably in proving this ingredient.

29- The Constitution Bench of the Hon'ble Supreme Court in the case of **Dhaneshwar Narain Saxena Vs. The Delhi Administration** reported in **AIR 1962 Supreme Court 195** has observed under :

"The offence under Section 5 is wider and not narrower than the offence of bribery as defined in Section 161 I.P.C. In order to bring the charge home to an accused person under cl. (d) of Section 5(1), it is not necessary that the public servant in question, while misconducting himself, should have done so in the discharge of his duty. It would be anomalous to say that a public servant has misconducted himself in the discharge of his duty. "Duty" and "misconduct" go ill together. If a person has miscondcuted himself as a public servant, it would not ordinarily be in the discharge of his duty, but the reverse of it, it is not necessary to constitute the offence under cl. (d) of the section that the public servant must do something in

connection, with his own duty and thereby obtain any valuable thing or pecuniary advantage. It is equally wrong to say that if a public servant were to take money from a third person, by corrupt or illegal means or otherwise abusing his official position, in order to corrupt some other public servant, without there being any question of his misconducting himself in the discharge of his own duty, he has not committed an offence under Section 5(1)(d). It is also erroneous to hold that the essence of an offence under S. 5(2) read with S. 5(1)(d), is that the public servant should do something in the discharge of his own duty and thereby obtain a valuable thing or pecuniary advantage."

30- It is significant to note that there is no material difference in the language of Section 5(i)(d) and Section 13(1) (d) of the Prevention of Corruption Act, 1988.

31- On the basis of the aforesaid observation and assessment of the material available before me, the following circumstances in the instant case emerge-

That the petitioner handed over the drafts in question to the U.P. Rajkiya Cement Nigam and M/s Maihar Cement Company through their forwarding agents namely Sri Nath Enterprises and Sri Traders (India) Limited in accordance with the practice prevalent in the department and in discharge of his official duty. The entrustment of the drafts to Maihar Cement as well as U.P. Rajkiya Cement Nigam thus does not constitute any misconduct and the companies as well as their consignee agents are alone liable for its payment back to the Mechanical Equipments and Store Division- I. The material further shows that no fraud whatsoever was committed by the

petitioner nor any undue benefit out of it was gained by him. There is also no evidence on record to substantiate any allegation that any illegal gain was made to himself by the petitioner from these transactions. The evidence available on the record also reveal that the amount of the impugned drafts having been credited in the account of the firms and since Sri Pal and Sri Sunil both are partners in the aforesaid two firms, therefore, either they are to refund the money to the department or the M/S Maihar Cement Company and U.P. Rajkiya Cement Nigam are to do so. There is a total lack of any exercise on the part of Sri B.B.L. Mittal, the successor Executive Engineer to recover either the money from Sri Nath Enterprises of Sri Traders or in lieu thereof the requisite cement from them as agreed by Sri Pal in the meeting with the Chief Engineer wherein Sri Mittal was also present. There is evidence on record that Sri Pal resumed supply of cement against advance payments received for Maihar Cement within 5 days of the receipt of the drafts but Sri Mittal declined to accept it from him.

32- In view of the above said discussion, no offence U/S 13(1)(c)(d) (ii) and Section 13 (2) of the Prevention of Corruption Act 1988 is disclosed against the petitioner nor any offence U/Ss 409 and 120-B I.P.C. for which the petitioner stands charged, is made out. The prosecution of the petitioner for the aforesaid charges amount to gross abuse of the process of the court.

33- It has been brought to the notice of this court at the bar that the applicant is a retired person and the continuance of this trial against him without making of the basic ingredients is too hard for him to withstand. The offences pertain to 1998 is equally relevant in this context.

34- The Hon'ble Apex Court in a catena of decisions has held that if no offence is made out against the accused, then it will be a miscarriage of justice as well as abuse of process of court, if the prosecution of the accused is permitted to continue.

35- In view of the discussions made above the petitions are allowed. The proceedings of Special Trial No. 2/2003, State Versus R.K. Jain, U/Ss 409, 120-B I.P.C. and Section 13(1)(c)(d) (ii) read with Section 13 (2) of Prevention of Corruption Act, 1988, as well as the proceedings of Special Trial No. 3/2002, State Versus R.K. Jain, U/Ss 409, 120-B I.P.C. and Section 13 (1) (c) (d) (ii) read with Section 13 (2) of Prevention of Corruption Act, 1988, pending in the court of Special Judge/ II F.T.C., Nainital are hereby quashed.

(B.C. Kandpal, J.)

Dated: August 22, 2006
ISB